

**Appendix 2:  
Excerpt from  
September 27, 1999  
Staff Memorandum  
Re: “Prenotice  
Discussion on  
Deadlines for  
Submitting  
Documents to the  
Commission.”**

**(pp. 6 - 8.)**

### Option C. Restructure the Commission's Rulemaking Procedures

Another option is to rework longstanding FPPC rulemaking practice, to ensure that a single deadline for all materials, including regulatory materials, meets legal requirements. Many agencies and commissions operate under a system that can be summarized as follows:

1. The Commission sends out a 30-day notice in compliance with Government Code Section 11423. The notice states that there will be a public meeting to discuss adoption of a regulation.
2. Written comments are received during the 30-day notice and comment period. Those comments become part of the record and are copied for Commissioners and included in their packets of material.
3. Staff prepares an initial memorandum summarizing the regulation and the reasons supporting the regulation. This memorandum is included in the packets given to Commissioners and is made available to the public.
4. At the public hearing, additional written and oral comments are received.
5. After all commentators have come forward at the public hearing, the record is closed at 5:00 p.m. that day. The Commission may, however, elect to keep the record open to allow for additional written comments.
6. Staff prepares a second memorandum incorporating written and oral comments made at the meeting.
7. If the second memorandum recommends substantive changes to the proposal, staff prepares a 15-day notice. This notice is mailed to commissioners, all persons who testified at the hearing or submitted written comments, and all persons who request such a notice. This notice states the period (usually 15

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<sup>7</sup> Regulation 18361.5 and Regulation 18326 provide additional deadlines for submitting written materials to the Commission. Because these deadlines are not linked to the date of Commission meetings, they have not created last-minute submission problems. Therefore, they are not considered in this memorandum.

days) within which comments will be received on the modifications to the original proposal. This notice should include the amendment to the regulation as originally proposed, the subsequent proposed modifications, and the second staff memorandum.

8. When the Commission is ready to adopt the regulation, it notices the adoption of the regulation as part of its "Business Meeting" section on its agenda. The vote is taken at the meeting. However, no written or oral comments from the public are accepted.

A process like this would streamline and consolidate the more cumbersome rulemaking process currently employed by the FPPC. Under current practice, the vast majority of regulatory items are noticed and discussed at both a prenotice hearing and an adoption hearing, with public comment taken at both stages. Staff typically prepares separate memoranda for each noticed meeting. The new system would eliminate prenotice discussion.<sup>8</sup> Instead, the first hearing would be the adoption proceeding. Under the new system, staff would only prepare a second memorandum if the Commission requests substantive changes at the adoption hearing. There would be two votes, but only a single round of public comment.<sup>9</sup>

Other governmental agencies using this rulemaking process are governed by the current APA. There may be some question as to whether this system would comply with the 1974 version of the APA, which governs the FPPC. Legal Division staff advises that it would. The 1974 APA is much more restrictive and imposes many more requirements than the current version. There is nothing in the 1974 APA to prohibit the Commission from waiting to vote on an item at a later meeting in order to give the Commissioners adequate time to review written materials.

There was substantial opposition to this proposal from interested persons. The predominant thought is that because this agency deals with a unique area of the law that often implicates First Amendment rights, the prenotice discussions are vital in order to get a full understanding of the issues before the Commission.

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<sup>8</sup> The Commission's current practice of holding two public hearings on rulemaking items stems from Regulation 18312(b)(1) that provides:

"The Commission may, *at its discretion*, hold a prenotice hearing on any regulation that will be the subject of Commission regulatory action in the future. The purpose of the prenotice hearing is to permit the Commission to consider and accept public comment regarding regulatory action proposed by the Commission." (Emphasis added.)

<sup>9</sup> As part of its regulation schedule for the upcoming year, Legal Staff will propose that prenotice discussions be eliminated in the Conflict of Interest Phase II project. Staff will likely recommend that interested persons' meetings and working groups take the place of prenotice proceedings. Staff is willing to commit itself to this course in order to expedite the Phase II project, and anticipates that interested persons will join with them in this effort. This could be an excellent opportunity to explore the benefits of a faster rulemaking process, before committing to the process.

This option would be a radical departure from the Commission's longstanding rulemaking procedure. Accordingly, if the Commission decides to pursue this option, staff proposes that this be included in the Commission's regulation package for the year 2000.